In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES OF AMERICA, plaintiff in error,
v.
THE MONTANA LUMBER AND MANUFACTURING COMPANY, The Northern Pacific Railway Company, et al. } No. 125.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This action was instituted by the United States, in the District Court of the United States in and for the district of Montana, against the defendants to recover the sum of $15,000, the value of 2,000,000 feet of lumber manufactured out of timber and logs which had been cut from unsurveyed Government lands, situated within the district of Montana, and converted by the defendants to their own use and benefit.

The complaint in said action was filed on December 30, 1901, and it is therein alleged that on the 10th day of July, A. D. 1901, and long prior thereto, the plaintiff was the owner and entitled to the possession of 2,000,000

feet of lumber, which had theretofore been manufactured out of timber and logs cut from unsurveyed Government lands, which, when the same shall have been surveyed, will be township 26 north, of range 34 west, of the Montana meridian in the State and district of Montana. That on the said 10th day of July, A. D. 1901, and while the plaintiff was so the owner of said lumber, the defendants wrongfully and unlawfully took possession of the same, disposed of and converted said lumber to their own use and benefit to plaintiff's damage in the sum of $15,000

To this complaint the Northern Pacific Railway Company, on January 29, 1902, filed its separate answer, and, admitting its corporate existence and the corporate existence of the Montana Lumber and Manufacturing Company, denied each and every other allegation of the complaint.

On February 3, 1902, the Montana Lumber and Manufacturing Company, O. J. McConnell, and Alex. Johnson filed their joint answer, in which, after admitting the corporate existence of the defendant corporation and denying each and every other allegation in the complaint contained, they alleged by way of further answer and defense the truth of the fact that at or about the time mentioned in the complaint they cut timber from the premises mentioned and described in said complaint, but that all of the timber from which said lumber was manufactured by them was cut from that portion of said township which would be when surveyed section 5 of said township; that said section

is within the limits of the grant by act of Congress to the Northern Pacific Railway Company, and that the defendant, the Montana Lumber and Manufacturing Company, was, at the time of the cutting of said timber, by mesne conveyances from the Northern Pacific Railway, the owner of and entitled to the possession of the lands upon which the timber was growing at the time it was cut.

To the answer of the Montana Lumber and Manufacturing Company, McConnell, and Johnson, the Government, on the 19th day of February, filed its replication, denying specifically each and every allegation contained in the affirmative matter and defense set up in said answer.

The case came on for trial on December 3, 1902, before the court and a jury. There was no evidence adduced by the plaintiff connecting the Northern Pacific Railway Company with the taking and conversion of the lumber involved in the case, and, upon motion, the case as to that corporation was dismissed.

The evidence shows that township 26, north of range 34 west, described in the complaint, and from which the timber was cut, is wholly unsurveyed, but is situated within the limits of the Congressional grant to the Northern Pacific Railway Company. The nearest Government survey at this time is approximately 20 miles distant. (Transcript, pp. 17–18.)

For the purpose of establishing the affirmative matter set up in the answer, the trial court, over the objection of counsel for the plaintiff, permitted the

defendant, the Montana Lumber and Manufacturing Company, to introduce evidence of a private survey of a portion of the township in question by one John K. Ashley, civil engineer and surveyor, made by him in 1886 for the Northern Pacific Railroad Company, for the purpose of ascertaining the location of the railroad sections contained in said township, which was supplemented by further evidence that the timber cut by the defendant, the Montana Lumber and Manufacturing Company, was taken from what Ashley had designated and defined, by means of his survey, as section 5 of said township.

As to the manner in which he had made this survey, Mr. Ashley testified that he commenced the same at the last or most western Government survey, at Horse Plains, a distance of 28 miles east of the township in question in this case, and thence running a distance of 28 miles west and 36 miles south of township 26 and on to the State line, cutting out sections through the different townships throughout the mountains, confining himself to the valleys that were wooded. That upon that occasion he surveyed what would be section 5, township 26 north, range 34 west, detailing in particular the method of operation and the markings made by him upon the ground to identify the sections. Upon the conclusion of the witness Ashley's direct examination, counsel for the Government moved to strike out all the testimony given by the witness concerning the survey and establishment by him of section 5 of the unsurveyed township in question, which the court

overruled, to which ruling an exception was taken. (Transcript, p. 25.)

On cross-examination the witness Ashley testified and admitted that surveys of the kind made by him might entirely miss the lines afterwards established by the Government surveys; that two sets of chainmen measuring a mile would not get it the same; that the difference in chaining might make a difference in the lines; that it was true that what was claimed in this case as section 5, under the Northern Pacific survey, might, after the Government's survey is made, be section 4 or 6, or some other section. The court also admitted in evidence, over the objection of counsel for plaintiff, a paper purporting to be a deed from the Northern Pacific Railroad Company to the Montana Lumber and Manufacturing Company for all of *unsurveyed section* 5, township 26, north of range 34 west. To this ruling counsel for plaintiff excepted. (Transcript, p. 31.)

Thereupon, and after the defendants had rested, the plaintiff offered to prove, in rebuttal, by George F. Rigby, a surveyor and engineer, that he and one Vogel had made a survey of the same lands covered by the survey made by Mr. Ashley for the Northern Pacific Railroad Company, that the Ashley survey was incorrect, and that, according to the Rigby survey, the location of section 5 of the township in question as made by Ashley had been placed three-quarters of a mile too far east. The court refused to permit the

witness to testify to these facts, and thereupon instructed the jury to return a verdict for the defendants, on the ground that the Government had failed to prove its ownership of the land from which the timber was cut, to which ruling counsel for plaintiff then and there and before the jury retired, duly excepted. (Transcript, p. 33.)

The Government sued out a writ of error from the Circuit Court of Appeals for the Ninth Circuit in order to have the cause reviewed by said court. The assignment of errors was as follows:

> I. The court erred in overruling the objection of counsel for plaintiff to the following question asked of the witness, George F. Rigby, upon the cross-examination, to wit:
>
> "Q. Did you make any effort to ascertain from what section the timber was being cut?"
>
> To which question, the objection thereto having been by the court overruled, the witness answered:
>
> "A. The efforts that I made were, I located it by the corner that was put in there by what was called the Northern Pacific survey."
>
> II. The court erred in overruling the objection of counsel for the plaintiff to the following question asked of the witness, George F. Rigby, upon his cross-examination, to wit:
>
> "Q. What section would the land be?"
>
> To which question, the objection thereto having been by the court overruled, the witness answered:
>
> "A. They claim it to be on section 5. From my investigation of the ground from which the

cutting had taken place, I would say it was on section five by the Northern Pacific survey. I did not make any estimate of what had been cut. Mrs. Oman was conducting the business at that time. That particular time when this was cut was in 1898 and 1899. I have been there since."

III. The court erred in overruling the objection of counsel for the plaintiff to the following question asked of the witness, Daniel Arms, to wit:

"Q. How has that land been classified?"

To which question, the objection thereto having been by the court overruled, the witness answered:

"A. It has been classified as nonmineral. I have the data on the classification here if you desire it."

IV. The court erred in overruling the objection of counsel for the plaintiff to the following question asked of the witness, Daniel Arms, to wit:

"Q. What is the classification of township 26, north of range 34?"

To which question, the objection thereto having been by the court overruled, the witness answered:

"A. It has been classified as nonmineral, the entire township. I want to correct the statement I just made. I state the entire township was classified as nonmineral; it is just section five. The entire township is not classified as nonmineral. As to what portion of the entire township has been so classified, as we run the

lines there would be—I can give you the sections classified as nonmineral. Sections 1, 2, 3, 4, and 5, seven to twelve, 13 to 18, inclusive. That is the north side of the township."

V. The court erred in overruling the objection of counsel for plaintiff to the following question of the witness, John K. Ashley, to wit:

"Q. State whether or not on that occasion you surveyed what would be section 5, township 26 north, range 34 west."

To which question, the objections thereto having been by the court overruled, the witness answered:

"A. Yes, sir."

VI. The court erred in overruling the objection of counsel for plaintiff to the following question asked of the witness, John K. Ashley, to wit:

"Q. You may detail, Mr. Ashley, the method of making such survey, together with the markings that were put upon the ground to identify the sections."

To which question, the objection thereto having been by the court overruled, the witness answered in substance as follows:

"A. I described the point I started from. I followed up the railroad until I began to cut up the country into sections, then followed the general order of doing work as is done by the Government deputies. I did the marking at the order of Mr. Buckley, and marked the corners just the same as if I had marked them on a Government survey. These markings were similar to those made by a Government sur-

veyor, made by the same instruments and the same way that the Government manual instructs its surveyors to do. I marked the section corners, quarter-section corners, and when I passed what was called the standard lines I would mark those. As to the section corners, we blazed them, very particularly and carefully, so that a person could follow them right along without an instrument. The purpose was to definitely locate the railroad land, so that the railroad could cut the timber. I believe the survey which I made was a very correct one. I used all the care I could use. My instruments were all in perfect adjustment. I took my meridian at least twice a week, and I allowed on my calculations for the latitude. In making these calculations, I used the same tables which are used by the Government surveyors."

VII. The court erred in denying the motion of counsel for plaintiff to strike out all of the testimony of the witness John K. Ashley, given over the objection of counsel for plaintiff concerning the establishment by him of section five, township twenty-six north, of range thirty-four west, said testimony being in substance that in 1886 and 1887 the witness worked for the Northern Pacific Railroad Company in Montana, and during that time made a survey of township twenty-six north, of range thirty-four west, for the Northern Pacific Railroad Company, for the purpose of ascertaining the even and odd numbered sections, and to find out the railroad sections in said township; that the said survey

was made under the orders of the general manager of the railroad company, and for the benefit of the said railroad company. That on that occasion witness surveyed what would be section five of township twenty-six, north of range thirty-four west, established the corners of said section five and marked the same.

Said motion to strike out the said testimony having been made by counsel for plaintiff upon the ground that the same was incompetent, irrelevant, and immaterial, for the reason that, the said township being unsurveyed lands, any private survey made by the witness for the Northern Pacific Railroad Company was of no legal effect whatever, and that any location that the witness might have made by reason of such survey would be of no legal effect, and would not preclude the Government from maintaining this action. And on the further ground that, until the survey has been officially made by the proper officers of the Government, and the expenses of such survey had been paid for, the legal title to the lands in question in said cause, even though within the limits of the railroad grant, would be in the Government of the United States.

VIII. The court erred in overruling the objection of counsel for plaintiff to the following question asked of the witness G. W. Sparks, concerning what was claimed to be section five, township twenty-six north, range thirty-four west, to wit:

"Q Tell the jury what posts or monuments you found upon the land designating the township and section and range."

To the question, the objection having been by the court overruled, the witness in substance answered as follows:

"A. I found four corners and three-quarter posts. The northeast corner of section five was the first corner that I found that I could read. The corner was a hemlock tree, blazed on four sides with each section marked on, and four witness trees, and I think these four witness trees were all hemlock. They were marked to show the bearings. The markings of these sections read just the same as it did on each one of the corners. Proceeding west along the line of the section, I found a quarter post marked 1/4 sec. B. T. I found a northwest quarter post. That was also marked similar to the corner described, only there was a stake there. There were bearing trees. Coming down to the southwest corner, I found a southwest corner. It was properly marked and bearing tree in place. As to the southeast corner, the southeast corner was burned. I found the trees there. I made an effort to trace the lines as indicated by those posts."

IX. The court erred in overruling the objection of counsel for plaintff to the following question asked of the witness O. J. McConnell, relative to what was claimed to be section five, township 26 north, range thirty-four west, to wit:

"Q. Prior to entering into the contract with Mr. Oman, what did you do with reference to the title of section five? Did you make any arrangements as to that?"

To which question, the objection thereto having been by the court overruled, the witness answered:

"A. Yes, sir. About August, 1897, we made a contract with the Northern Pacific Railroad Company for the purchase of section five. That contract resulted in a deed."

X. The court erred in admitting in evidence, over the objection of counsel for plaintiff, a deed from the Northern Pacific Railroad Company to the Montana Lumber and Manufacturing Company, the said deed being dated the 7th day of November, 1898, and being for all of unsurveyed section 5, township 26, north of range 34 west.

XI. The court erred in sustaining the objection of counsel for defendants, the Montana Lumber and Manufacturing Company, M. J. McConnell and Alex Johnson, to the following question asked during the examination, in rebuttal, of the witness George F. Rigby, a surveyor, to wit:

"Q. State whether or not the survey which you made was over the same territory that had been prior thereto surveyed by the Northern Pacific Railroad Company."

In answer to which question the witness Rigby, if permitted to do so, would have answered that the survey made by him, referred to in the question, was over the same territory and covered the same ground as that which had been surveyed prior thereto by the Northern Pacific Railroad Company.

XII. The court erred in sustaining the objection of counsel for the defendants, the Mon-

tana Lumber and Manufacturing Company, M. J. McConnell and Alex Johnson, to the following question asked during the examination, in rebuttal, of George F. Rigby, a surveyor, to wit:

"Q. What have you to say as to whether the survey that you made there conformed to the survey that had prior to that time been made by the Northern Pacific Railroad Company?"

In answer to which question, if he had been permitted to do so, the witness would have stated that the survey made by him did not conform to the survey made by the Northern Pacific Railroad Company, but that according to the survey made by him the lines defined by the Northern Pacific railroad survey were located three-fourths of a mile east of where they should have been located.

XIII. The court erred in sustaining the objection of counsel for the defendants, the Montana Lumber and Manufacturing Company, M. J. McConnell and Alex Johnson, to the offer of counsel for plaintiff, the United States of America, to prove by the witness, George F. Rigby, a surveyor, that a survey was made by said witness and one Vogel, covering the same territory and extending over the same ground covered by the survey made by the Northern Pacific Railroad Company theretofore testified to in the trial of the case, and to prove by said witness Rigby that the survey made by him and the said Vogel showed that what had been established or located as section 5, township 26 north, of range 34 west, under the Northern

Pacific survey, was not section 5 at all, but that section five was located three-fourths of a mile farther west than it is designated and located by the Northern Pacific survey.

XIV. The court erred in refusing to allow plaintiff to prove in rebuttal, by the witness George F. Rigby, a surveyor, that a survey was made by said witness and one Vogel covering the same territory and extending over the same ground covered by the survey made by the Northern Pacific Railroad Company, theretofore testified to in the trial of this case, and that the said survey so made by said witness and Vogel, showed that what had been established or located as section 5, township 26, north of range 34 west, under the Northern Pacific survey, was not section 5 at all, but that section 5 was located three-fourths of a mile farther west than it is designated and located by the Northern Pacific survey.

XV. The court erred in granting the motion of counsel for defendants, the Montana Lumber and Manufacturing Company, M. J. McConnell and Alex Johnson, made at the close of the evidence in said cause, to instruct the jury to return a verdict in favor of said defendants.

XVI. The court erred in granting the motion of counsel for defendants, the Montana Lumber and Manufacturing Company, M. J. McConnell and Alex Johnson, made at the close of the evidence in said case, to instruct the jury to return a verdict in favor of the said defendants upon the ground that the Government had not

shown that it was the owner of the lands from which the timber was cut.

The cause came on for hearing before the Circuit Court of Appeals for the Ninth Circuit at San Francisco, on the 5th day of October, 1903. That court defers its decision until it shall have been instructed by the Supreme Court of the United States upon three questions of law, which are set out in the certificate of said Circuit Court of Appeals, which is as follows (transcript, p. 1):

> This cause having come on to be heard upon the pleadings and the bill of exceptions upon a writ of error whereby it is sought to review the judgment of the district court of the United States for the district of Montana in an action brought by the United States against the defendants in error to recover the sum of $15,000, the value of 2,000,000 feet of lumber manufactured out of timber and logs which had been cut by the Montana Lumber and Manufacturing Company from unsurveyed Government lands situate within the district of Montana, and converted by the defendants in error to their own use and benefit;
>
> And it appearing that the complaint in said action was filed on December 30, 1901; and that it alleged that on July 10, 1901, and long prior thereto, the plaintiff in error was the owner and entitled to the possession of 2,000,000 feet of lumber which it was alleged had been cut by the defendants in error, and that the said timber was cut from unsurveyed Government lands, which, when the same shall have been surveyed, will be township 26 north of range 34 west,

Montana meridian, in the State and district of Montana; that on said 10th day of July, 1901, and while the plaintiff in error was so the owner of said lumber, the defendants in error wrongfully and unlawfully took possession of the same, disposed of and converted the same to their own use and benefit, to the damage of the plaintiff in error in the sum of $15,000, which is the value of said lumber; that to this complaint the Northern Pacific Railway Company filed its separate answer, denying the material allegations of the complaint; that the other defendants in error made a joint answer likewise denying the material allegations of the complaint, but alleging by way of further answer and defense that although they cut timber from the premises mentioned in the complaint, all of said timber was cut from that portion of said township which will be, when surveyed, section 5, and that said section is within the limits of the grant by act of Congress to the Northern Pacific Railway Company, and that the defendant, the Montana Lumber and Manufacturing Company, was at the time of the cutting of said timber, by mesne conveyances from the Northern Pacific Railway Company, the owner of and entitled to the lands upon which said timber was growing at the time it was cut;

And it further appearing that upon the issues so joined the cause was tried before the court and a jury, and that it was proven that the land from which the timber was cut was within the limits of the Congressional grant to the Northern Pacific Railway Company, was unoccupied pub-

lic land, and was wholly unsurveyed, and that the nearest Government survey is approximately 20 miles distant; that for the purpose of establishing the affirmative matter set up in the answer, the trial court, over the objection of the plaintiff in error, permitted the Montana Lumber and Manufacturing Company to introduce evidence of a private survey of a portion of the township in question, made by one John K. Ashley, a civil engineer and surveyor, and that it was made by him in the year 1886 for the Northern Pacific Railway Company for the purpose of ascertaining the location of the railroad sections contained in said township, and to prove by other evidence that the timber cut by the Montana Lumber and Manufacturing Company was taken from what Ashley has designated and defined by means of his survey to be section 5 of said township; that after the defendants had rested their case, the plaintiff in error offered to prove in rebuttal by George F. Rigby, a surveyor and an engineer, a witness called on behalf of the United States, that he and another had made a survey of the same lands and that the Ashley survey was incorrect, and that section 5, as located by Ashley, had been placed three-quarters of a mile too far east; that the court refused to permit the witness to testify to these facts, and that thereupon the court instructed the jury to return a verdict for the defendants in error, on the ground that the United States had failed to prove its ownership of the land from which the timber was cut;

And it appearing that the rulings of the district court in admitting in evidence the testi-

mony as to the Ashley survey and in excluding the evidence offered by the plaintiff in error to rebut the same, and in directing the jury to return a verdict for the defendants in error on the ground above stated, are assigned as error; and

Whereas this court is divided in opinion upon the questions of law so presented, and another case involving similar questions is pending before this court on writ of error to the district court of the United States for the district of Montana, and a third case is pending before this court on writ of error to the circuit court of the United States for the eastern division of the district of Washington, and it is of public importance that said questions be speedily and finally determined;

It is ordered that the following questions of law be, and the same are hereby, certified to the Supreme Court of the United States for its determination:

First. Did the district court for the district of Montana err in admitting in evidence the proof of the survey made by Ashley and the proof tending to show that the timber cut by the Montana Lumber and Manufacturing Company had been cut on what will be, when surveyed by the United States, section 5 of township 26 north, of range 34 west, Montana meridian?

Second. Did the court err in excluding the evidence offered, on behalf of the plaintiff in error, tending to show that the Ashley survey was erroneous?

Third. Did the court err in instructing the jury to return a verdict for the defendants in

error on the ground that the United States had failed to prove its ownership of the land from which the timber was cut?

ARGUMENT.

The act of Congress of July 2, 1864, granting lands to the Northern Pacific Railroad Company, is well known to the court, and it is only necessary here to quote sections 3 and 6. They are as follows:

> SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the "Northern Pacific Railroad Company," its successors, and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been

granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: *Provided*, That if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said "Northern Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first section of this act: *Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road, may be selected as above provided: *And provided further*, That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided further*, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said "Northern Pacific Railroad."

* * * * *

SEC. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or preemption before or after they are surveyed, except by said company, as provided in this Act; but the provisions of the Act of September, eighteen hundred and forty-one, granting preemption rights, and the Acts amendatory thereof, and of the Act entitled "An Act to secure homesteads to actual settlers on the public domain," approved May twentieth, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale.

As to survey, we quote from the act of July 15, 1870, "An act making appropriation for sundry civil expenses of the Government for the year ending June 30, 1871, and for other purposes:"

* * * * *

For the survey of the public lands within the limits of the land grant to the Northern Pacific Railroad Company in a direct line extending from Duluth, on Lake Superior, to George-

> town, on the Red River of the North, ninety-five thousand nine hundred and eighty dollars: *Provided*, That five thousand dollars of this appropriation shall be expended for office work by the surveyor-general of Minnesota: *And provided further*, That before any land granted to said company by the United States shall be conveyed to any party entitled thereto under any of the acts incorporating or relating to said company, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same, by the said company or party in interest.

At the outset it will thus be seen that while the grant was one *in præsenti*, the survey was to be made under the immediate direction of the President of the United States, and that no conveyance or patent should issue to the parties interested until the railroad company had deposited funds to cover the cost of surveying the lands, so that any private survey or survey made at the instance of private parties could have no legal efficacy, and that no conveyance of such unsurveyed lands could be of legal effect, however much the railroad company may have done to effect an equitable claim in favor of private parties to lands to which the railroad company, after compliance with the terms of these acts of Congress, would become legally entitled.

It is true that the complaint in this case sets forth the fact that the lands, while unsurveyed, would have been located upon survey within a certain township, but it must be borne in mind by this court that this allegation in the complaint particularizing the township

was in deference to the almost uniform holding by the Federal courts of the Northwestern States that such an allegation is necessary in order to show the locality from which the timber is taken by trespass or conversion. But we here assert and maintain that such allegation, made in deference to such erroneous holding of these courts, was purely surplusage and that it would be sufficient in any case to have alleged merely that the property in question was taken from unsurveyed public lands of the plaintiff within the district of Montana, or at most within the boundaries of a county and within the district of Montana. If this contention be correct, it follows that it was not necessary for the plaintiff in this case to have proved upon the trial the exact location of the premises from which the timber was cut by any survey whatever in order to establish its prima facie case.

THE GOVERNMENT'S PRIMA FACIE CASE.

What showing was necessary to establish the plaintiff's prima facie case?

All lands within the district were presumed to belong to the United States, and hence no proof was required upon that subject.

The appropriation or conversion of the timber and the amount thereof was solemnly admitted in the plea of the defendant. (Transcript, p. 7.) This was also proved. (Transcript, pp. 17–22.)

It was also shown that the timber was appropriated from standing trees upon the public lands which de-

fendants had cut down and manufactured into logs and lumber.

No effort was made by defendants to have the court direct the jury to return a verdict for defendants by reason of any failure in proof at the time the Government rested its case.

THE DEFENDANTS' CASE.

To support their special defense the defendants then offered a purely private survey. It had no sanction of authority from any officer of the Government. It was not in pursuance of any act of Congress. It was made in the interest of parties directly interested with these defendants. Its admission was objected to by the plaintiff. It was admitted by the court. Its admission was excepted to, and the party making it admitted its fallibility on cross-examination.

The other evidence was a deed from the Northern Pacific Railroad Company of the alleged section 5 to the defendants, which was objected to by plaintiff; the objection was overruled, the evidence received, and the ruling of the court excepted to.

The only other evidence for defendants was that tending to show that the timber in question was taken by defendants from the alleged section 5, according to the private survey.

THE REBUTTAL.

Conceiving that the evidence thus received should be rebutted, the Government offered to show that the survey was not correct and that the lands in question

by a proper survey would not be section 5 at all. This proposed testimony was rejected by the court, to which ruling an exception was taken.

THE ACTION OF THE COURT.

The court then took the case from the jury upon the ruling that the plaintiff had not proved its ownership of the land, and the court's action was duly excepted to.

We have thus brought the case, for the purposes of argument, into a small compass. The case was taken to the Circuit Court of Appeals upon an assignment of errors, and the questions submitted by them to this court take the place of assignment of errors here.

THE FIRST QUESTION.

We shall now proceed to consider the first question certified by the Circuit Court of Appeals, namely: Did the District Court for the district of Montana err in admitting in evidence the proof of the survey made by Ashley, and the proof tending to show that the timber cut by the Montana Lumber and Manufacturing Company had been cut on what will be, and when surveyed by the United States, section 5 of township 26 north of range 34 west of the Montana meridian?

If there is a thoroughly established and fully recognized principle of law, it is that a sovereign makes its own surveys and fixes the boundaries of its grants. The Ashley survey, made under the direction of the Northern Pacific Railway, was incompetent, and the fact that Ashley testified that it was made after the method of Government surveys did not relieve it of

its vice. The claim that a grantee has the right to establish the boundaries of his grant by his own survey will certainly not be recognized by this court. Not only has the grantee no right to establish the boundary; a court of justice has not such a right. In the case of *Cooper* v. *Roberts*, 18 How., 175, this court said: "The courts of justice have no authority to mark out and define the land which shall be subject to the grant." To the same effect is *Cragin* v. *Powell*, 128, U. S., 691. In *Robinson* v. *Forest*, 29 California, 325, the principle is laid down that neither a private survey nor one made under the authority of the State will answer the purpose.

Said the Supreme Court of the United States, in the case of *Magwire* v. *Tyler*, 8 Wall., on pages 660–661:

> Where the documentary evidence of title produced by the claimant contains no sufficient lines or boundaries to show that any definite and distinct parcel of land was *severed* from the public domain, the universal rule, as settled by repeated decisions of this court, is that the concession in such a case creates no right *of private property in any particular tract of land* which can be maintained in a court of justice without an *antecedent survey*, * * * and such a title, until the survey was made, attached to *no land*, nor could a court of justice ascertain its boundaries, as that power was reserved to the executive department of the Federal Government.

Mr. Attorney-General Miller, in considering the surveys made by the Northern Pacific Company, said:

> Neither has it authority to select and locate its sections and then despoil the sections it has selected. The United States makes its own surveys. Such surveys are without authority of law and without legal effect. (Vol. 20, Op., p. 542.)

The Supreme Court, in the case of *Cragin* v. *Powell*, *supra*, said:

> From the earliest days matters pertaining to the survey of public or private lands have devolved upon the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior.

Mr. Justice Bradley, in the case of *United States* v. *McLaughlin*, 127 U. S., 428, says:

> Grants are of three kinds: 1. Grants by specific boundaries where the donee is entitled to the whole tract, whether it be more or less. 2. Grants of *quantity*, as of one or more leagues *within a larger tract* designated by what are called outside boundaries, where the donee is entitled to the quantity specified and no more. 3. Grants of a certain place or rancho by name, where the donee is entitled to the whole tract. * * * In the first and third kinds, the claim of the grantee extends to the full limits of the boundaries designated in the grant or defined by occupation, but in the second kind—a grant *of quantity only* within a *larger tract*—a grant is really *a float*, to be located *by the consent of the Government before it can attach to any specific land.*

In *Grogan* v. *Knight*, 27 Cal., 519, the court said:

> It requires no argument to prove that the survey of public lands of the United States into sections and subdivisions of sections can be made only under the authority of Congress. * * * The selection of a particular tract as a subdivision of public land in anticipation of the survey by the United States would be no less wanting in authority than would the selection of a designated subdivision in anticipation of the grant by Congress.

In *Robinson* v. *Forrest*, 29 Cal., on page 325, the court said:

> Neither a private survey nor one made under the authority of the State will answer this purpose, but it must be made *under the authority of the United States*. Even after a principal meridian and a base line have been established and the exterior lines of the townships have been surveyed, neither the sections nor their subdivisions *can be said to have any existence* until the township is subdivided into sections and quarter sections by an approved survey. The lines are *not ascertained* by the survey, *but they are* CREATED.

In *Middleton* v. *Low*, 30 Cal., 605, the following language occurs:

> There is, in fact, NO SUCH TRACT OF LAND as that described in the petition until it has been located within the Congressional township by an actual survey and establishment of the lines, under the *authority of the United States*, and the survey has been approved by the proper United

States surveyor-general. A person may approximate to the lines that may be run—may surmise the precise lines—but the tract has *no separate legal identity* until the survey is made and approved under the authority of Congress.

Cited and approved in *Central Pac. R. Co.* v. *Nevada*, 162 U. S., p. 525, and *Bullock* v. *Rouse*, 81 Cal., pp. 593–595.

In the case of *Blake et al.* v. *Doherty et al.*, 5 Wheaton, 358, Mr. Chief Justice Marshall, delivering the opinion of the court, said (p. 362):

> But the court also admitted what is called a general plan and a survey made prior to the plaintiff's entry of the land, as claimed by the defendants. The bill of exceptions does not so describe this general plan as to enable the court to say with certainty what it is. If it is a plan made by authority, in conformity with any act of the legislature, it may be submitted, with other evidence, to the consideration of a jury, to avail, as much as it may, in ascertaining boundary.
>
> But the court has also permitted what is denominated a demarcation, which we understood to be a private survey, made by direction of a party interested under the grant, and assented to by the defendants, to be given in evidence. This private survey might have been made on any other part of the west fork of Cane Creek with as much propriety as on that where it has been made. It would have been equally admissible if placed anywhere else on that stream. To allow it any weight would be to allow the grantee to appropriate, by force of

> a grant, lands not originally appropriated by that grant. This would subvert all those principles relative to conveyances of land which we have been accustomed to consider as constituting immutable rules of property.

In *United States* v. *Hanson*, 16 Peters, 194, Mr. Justice Catron delivered the opinion of the court, and upon the subject of private survey said:

> In contrast to the official survey and return, how does this private one of Mr. McHardy stand? No proof was made that it was on the land granted; the surveyor does not even so assert, and there is no plat in the record; did it, however, appear in the clearest manner on the face of the paper it would be of no value. The private surveyor acted not for and with the interests of the Government, but at the instance of the grantee, and for his interest and against the Government. The survey was a private act * * *

Les Bois v. *Bramell*, 4 How., 449, was an attempt to make title through an old Spanish concession, in which it was necessary to establish the boundaries of the grant, and Mr. Justice Catron, at page 457, said:

> The survey referred to was one made of the commons in 1806, by James Mackay; and on a plat of the survey, filed with a notice of claim before the board of commissioners organized by virtue of the act of 1805, to examine and report on French and Spanish claims, this of Les Bois was laid down with six others. Mackay's survey was a private one, made at the instance of

> the inhabitants of St. Louis, and was not binding on the rights of anyone.

To the same effect is the case of *Mackay et al.* v. *Dillon*, 4 Howard, 448, which was heard and decided concurrently with the Bramell case above quoted from, the same learned justice delivering the opinion of the court.

In the case of *Glenn et al.* v. *United States*, 13 Howard, 256, which was an attempt to have a Spanish grant confirmed, private surveys in support of the grant were produced, but the court at page 256 said:

> The surveys produced to us are private ones and of no value in support of the claim.

In *Smith* v. *The United States*, 10 Peters, 326, it was again attempted to support the grant of land by the governor-general of Louisiana by survey made by the grantees, and Mr. Justice Baldwin in that case laid down in clear and strong language the principle which we urged upon the court at the beginning of the discussion of this first question. At page 355 he said:

> We have then to inquire whether a private survey made in 1811 could be so connected with the grant of 1796 as to operate, by relation, to make out a title to the land claimed in March, 1804. The laws of the United States give no authority to an individual to survey his his grant or claim to lands; he may mark lines to designate the extent and bounds of his claim, but he can acquire no rights thereby. * * * No government gives any validity to private surveys of its warrants or orders of survey; and we have no reason to think that Spain was

> a solitary exception even as to the general domain, by grants in the ordinary mode, for a specific quantity, to be located in one place; *a fortiori*, where a grant, *sui generis*, might by its terms be so split up as to cover every saline, mineral, and water-power site in the whole territory. Of all others, the survey of such a grant ought to be made by an authorized officer. If the grant was a lawful authority for such selections, its execution by survey ought to be so supervised that the selections should be made in a reasonable time, quantity of land and spots selected.

It seems almost unnecessary to draw this court's attention to the principle for which we are contending and the authorities in support thereof. We do so only because a high appellate court has asked this court for instruction upon the question.

If the right to make survey and establish the boundaries of a public grant belongs entirely to the sovereign power, it requires no argument to convince the court of the error committed by the learned judge of the trial court.

Even if this were not so, Congress, in the act of 1864 granting land to the Northern Pacific Railway Company, and upon which these defendants rest their defense, specifically made it the province of the Government to survey these lands and to say what lands shall and shall not be taken by the railway company. Section 6 of the act is as follows:

> SEC. 6. And be it further enacted, That the President of the United States shall cause the

> lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or preemption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preemption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale.

Had the defendants in this case procured a survey to be made under the auspices and authority of the United States, it might have been proper evidence to support their contention that the land in question was an odd-numbered section, even though the survey may not have been the regular official survey contemplated by section 6 of the granting act. Such a course would have at least brought them within the rule, which can not be here questioned, that the Government and not the grantee shall establish the boundaries of the grant.

It is all the more difficult to understand why this Ashley survey was admitted in evidence, in view of

the testimony of Mr. Ashley. Quoting from page 26 of the record:

> I can't say that as a matter of fact these private surveys that are made by parties hardly ever coincide with the Government lines as afterwards established, because when I was a Government surveyor I never paid any attention to these private surveys, and I don't suppose that these Government surveyors to-day do. As to whether, as a matter of fact, that lots of times when surveys of this kind are made by private parties they entirely miss lines afterwards established by the Government surveys; they may and may not. Of course, it is like this: You can take two sets of chainmen and let them measure a mile, and they won't get it the same. Their alignment will be all right, but the difference in chaining might make a difference in the lines. It is true that what is claimed here as section five under the Northern Pacific survey might, after the Government survey is made, be section four or six, or some other section. * * * I didn't mean to say that this survey which I made there, by means of which I located this section five, would be exactly like the survey which would hereafter be made by the Government of the United States. * * * I didn't terminate my survey at a Government corner, or attach it to a Government survey. I tied on to the State line, which is the Government survey, but, of course, I did not know at that time where that was.

Thus the court will see that, by his own testimony, Mr. Ashley impeached the correctness, validity, and value of the Northern Pacific survey.

The Northern Pacific Railway Company and its predecessor, the Northern Pacific Railroad Company, have had constructed lines for approximately a score of years and a line of definite location probably for a longer period. It is a singular circumstance that during all of that time they have applied for no survey of the lands in question by depositing the costs and expenses thereof with the proper United States authorities. In this instance, and probably in a number of other like cases, the value in the lands is confined to the timber. Strip them of that and there would be no motive impelling the company, or its so-called grantees, to pay taxes or survey fees. But the timber would be gone without an opportunity for the Government to hold the company responsible for anything, and thus another one of those very neat devices for overreaching both the State and Federal governments will have succeeded.

Shrewd parties, by sharp practice, have defeated the will of Congress, and, unfortunately, with the sanction of some of our western Federal courts. One of the shrewdest of these manifold schemes is the attempt to own this unsurveyed land so far as to sell the valuable timber growing thereon and yet not own it to the extent of securing a Government survey or paying State taxes.

Whether this case was brought by the United States

upon the theory that the railroad company and its conveyees were mistaken and were really cutting from what would be even-numbered sections, or upon the theory that it was in doubt whether they would be even or odd numbered sections, or still further, upon the theory that while it might be the odd-numbered sections and that the defendant had no right before receiving the legal title, as provided by the act of Congress, to venture upon the land and cut timber therefrom, seems to us unimportant. In any event they were violating the law. They were not ignorant of the law. It was plain, open, unqualified trespass.

If the railroad company has no right to take timber from these lands until the regular Government survey has been made, and that is beyond doubt the law, then the Ashley survey was inadmissible for two reasons—first, the survey was a private one, and second, it was not material upon what sections the timber was cut, since there is absolutely no right on the part of the company to take timber at all before an unqualified legal title is vested in the company by reason of such Government survey.

THE SECOND QUESTION.

The second question will now be discussed. It is as follows: "Did the court err in excluding the evidence offered in behalf of the plaintiff in error tending to show that the Ashley survey was erroneous?"

We think the court will conclude that there is but one real question in this case, and that is whether the claim of the defendants that the limits of their grant

can be established by a private survey is correct. We also think that the court must decide against such claim. But, for the purposes of argument upon the second question, we must assume that the testimony and survey of Ashley were properly admitted.

We do not contend that the Rigby or Government survey is the official survey contemplated by the sixth section of the granting act. In fact, it is not. But if the Ashley survey was admissible in evidence, certainly the Government had a right to rebut it by the production of another survey. In the direct testimony of Rigby the following question was asked by the Government's counsel: "What have you to say as to whether the survey that you made there conformed to the survey that had prior to that time been made by the Northern Pacific Railway Company?" An objection to this question by counsel for the defendants was sustained. If the court had permitted the witness to answer the question he would have answered that, according to the survey made by him, the lines defined by the Northern Pacific survey were located three-fourths of a mile east of where they should have been located. And thereupon counsel for the Government offered to show that a survey was made by Rigby and one Vogle covering the same territory as that covered by the Northern Pacific survey, and that the Rigby survey showed that what was established as section 5 by the Northern Pacific survey was not section 5 at all. (Transcript, p. 38.) This testimony and evidence were rejected. Thus was a private survey admitted in

evidence and a survey made under the authority and auspices of the Government of the United States rejected, although the latter was entitled to at least as much respect and weight as the private survey.

It was contended in the court below, and will doubtless be contended here, that the Rigby or Government survey was not proper evidence in rebuttal because it did not show wherein the Ashley survey was incorrect. It will be seen by the record (p. 32) that Government's counsel had barely started to examine Rigby as to the differences in the two surveys when that line of examination was completely obstructed by the court's ruling against it. Be that as it may, there is no force whatever in such contention. The introduction of the survey and testimony of Ashley was an attempt to establish a fact, viz, that the land in question would be section 5 when finally and officially surveyed. Assuming this testimony and survey to be correct, that would have been their final effect. Now, the testimony and survey of Rigby were offered for the purpose of disproving what was attempted to be shown by the defendants as a fact. It is not necessarily the method of proof or the means whereby a fact is sought to be established that is subject to evidence in rebuttal; it is the fact itself.

Had the Government so desired, it might have shown by a competent surveyor that the method adopted by Ashley was wrong or that an error was made in his calculations, and that therefore the result was wrong. But equally effective was another survey

showing the *result* of the Ashley survey to be wrong. A witness might testify that a certain event occurred at 10 o'clock and the opposing party might prove the incorrectness of the statement upon cross-examination by showing that he had arrived at his conclusion that it was 10 o'clock by an illogical process of deduction, which would disprove that which is sought to be established. But equally would his testimony be rebutted if another witness should testify that the event occurred at 11 o'clock.

THE THIRD QUESTION.

The third question is: "Did the court err in instructing the jury to return a verdict for the defendants in error on the ground that the United States had failed to prove its ownership of the land from which the timber was cut?"

Reviewing the pleadings in this case, it will be observed that the Government filed its complaint alleging that it was the owner and entitled to possession of the lumber in question, which had been taken from unsurveyed Government lands, which lands, when the same shall have been surveyed, will be township 26 north of range 34 west of Montana meridian, in the State and district of Montana. The answer of the Montana Lumber and Manufacturing Company and McConnell and Johnson denies these allegations.

In addition to this traverse, the answer sets up an affirmative plea admitting that the land from which the timber was cut would be the same as described in plaintiff's complaint, but alleging further that the land would

be within the limits of the grant by act of Congress to the Northern Pacific Railway Company, and that the Montana Lumber and Manufacturing Company was at the time of the cutting of said timber, by mesne conveyance from the Northern Pacific Railway Company, the owner of and entitled to the possession of the land upon which the timber was growing at the time it was cut. To this affirmative defense the Government filed its replication.

The effect of the pleadings, therefore, was to put the Government upon its proof as to the material allegations of its complaint, and, if they were sustained, to put the defendants upon proof of their special plea. But it will be observed that the complaint of the Government did not allege that the timber was taken from any particular section. Nor was such an allegation necessary in order to show a cause of action. If, therefore, the Government proved that the timber was cut from unsurveyed Government lands, its case was made. It was under no obligation to anticipate the defense that the land upon survey would be an odd-numbered section, and therefore within the grant of 1864 to the Northern Pacific Railway Company.

Assuming that the Government must prove its title to land in the public land States, the same as any other plaintiff, which we do not concede, we submit that that requirement was amply met. Special Agent Chadwick, of the General Land Office, testified that he was acquainted with township 26 north, of range 34 west, of the Montana meridian and that the lumber in

question was taken therefrom. The official survey had not been extended over the lands in question (Transcript, p. 17). Upon cross-examination he stated that he knew this to be township 26 north, of range 34 west, by the general map of Montana and Land Office records, and by the fact that if the Government lines were extended over the land in question they would show it to be of such description. (Transcript, p. 18.)

The effect of the grant of 1864 was to reserve to the Government the even-numbered sections, so that, owing to the peculiar admixture of title, when the Government established, by an officer of the General Land Office, that the land generally was public land, the fact, if true, that the timber was taken from an odd-numbered section, was peculiarly a matter of defense, particularly as the lands had not been surveyed. The Government was under no obligation, as above stated, to prove the negative fact that the land was not an odd-numbered section, nor was it under any obligation to prove that it had not parted with its title by patent or otherwise; so that, unless it was incumbent upon the Government to go back to the source of its title and prove its acquisition of the land in question through the Louisiana Purchase, which is, of course, the subject of judicial notice, there was nothing more as to title to prove.

But, aside from the above contentions, the Government, when the defendants sought to prove the allegations of their special defense (the burden of proof so to do being upon them), offered to prove by its surveyor that the land would not be section 5, but the

court refused to receive such proof, although it would have made the Government's case doubly strong. Under our system of civil procedure the test as to whether a case has been made is the effect of all the evidence offered by the plaintiff, and even had the Government failed to make its case in chief, and the opportunity for nonsuit when the Government rested its case was not taken advantage of, the evidence subsequently offered, even though it may have been in rebuttal, would have had the effect of making the Government's case complete.

The Government, therefore, not only sustained the allegations of its complaint and proved all that was necessary under the pleadings and in the nature of the case, but offered to go beyond the requirements of the pleadings and to show that the land in question was not that of the defendant, although it was not permitted to do so. The Government having proved the allegations of its complaint, the defendants sought to establish the truth of their special defense, namely, that the land was section 5 of the Northern Pacific grant, and upon what principle of evidence the Government was denied the right to rebut such proof is beyond our comprehension, particularly as we have shown in the discussion of the first question certified by the Circuit Court of Appeals that the evidence offered by the defendant in support of its affirmative plea was incompetent.

If the survey was offered by the defendants to disprove the Government's case, the Government should have been given an opportunity to prove that it was

incorrect. If it was offered in support of the defendant's special plea, the evidence and testimony attacking the correctness of the Ashley survey was equally receivable in rebuttal; so that in any event the Government's case was made.

It is true that some authorities hold that the grant to the Northern Pacific Railway Company was a grant *in præsenti*. But it is also a matter of law that no title can pass to any particular land until the regular official survey has been made, for until then there is no identification of the land granted. Therefore the Government, by its proof of the fact that township 26 was Government land, sustained the allegations of its complaint, and the defendants were therefore forced to disprove the Government's case if they could. This they sought to do by the same evidence which they were to offer in support of their special plea. If, then, such evidence was incompetent, it neither disproved the Government's case nor proved their special plea.

Outside of the thirteen original States of the Union we have been unable to find that any court has ever decided, or that any counsel has ever made the claim, that it was necessary that the United States, being the party plaintiff, should prove the title to its land. As in England primarily all lands were property of the Crown, so in the United States all lands outside of the said original States are presumed to belong to the United States, and any party claiming a title adverse to the Government must prove his way from the Government by a regular chain to himself. In the very nature of things this must be true.

Had the United States attorney, at the trial of the case, conceived it his duty, as a matter of law, to prove the Government ownership of the lands in question, what course could he have pursued in such an attempt? If he had offered in evidence the treaty with France it would have been said that that is a matter of history of which the court is bound to take judicial notice. If, as the next step, he had attempted to show the organization of the State of Montana and that the Federal Government had not transferred the lands ceded to the United States within its boundaries to the State of Montana, that would also have been a matter of public enactment and a negative proposition. If he had attempted to go back still further to the organization of the same Territory within Territorial limits by Congress, the same would have been the case. That was a matter of public enactment. If he had offered plats and maps from the General Land Office there would have been nothing in them admissible as evidence tending to show a legal title in the United States

In the event of any attempt to offer proof to show that the United States had never patented or granted the lands to any private party, that would have been impossible, and the utmost that he would have been able to do was to put some witness connected with the General Land Office upon the stand to testify that he had made diligent search among the records and had found no such grant or conveyance, especially in view of the fact that it was conceded that no survey of the land in question had ever been made How, then, we

ask, was the Government of the United States to proceed to show that it was the owner of the lands in question? There is but one conclusion that can be reached, namely, that it is a presumption of law in all cases that the sovereign, the United States of America, was and is the owner of all lands, and that he who seeks to claim adversely must prove his way from the Government to himself. Hence it seems to us, as an irresistible conclusion, that the trial court was in the plainest error possible in holding that the United States had not proved its ownership of the lands in question.

Counsel for defendants, in the Circuit Court of Appeals, seem to have taken some comfort from the case of the *Northern Pacific Railroad Company* v. *Hussey*, 61 Fed. Rep., 231, from the fact that the court there held that this same railroad company had been held to have had such an interest in unsurveyed lands within the limits of their grant as entitled it to enjoin trespassers from cutting timber. There can be no question about the correctness of the rule of the court in that case. The complainants, after their grant had been obtained, had an equitable interest in the land within the limits of their grant even though the lands were unsurveyed. Mere wrongdoers committing trespass within the limits of the grant were absolutely certain to be trespassing upon lands to which the company would ultimately get the legal title, or upon lands of the United States. If the United States did not move to check the trespassers upon the

mere chance that they might be cutting from lands which, being surveyed, might prove to belong to the railroad company, the company, having an equitable interest, of course had the right to protect its expectant estate from waste. It is an entire misconception, however, of the case at bar, where the question of legal title and not equitable interest is involved, to invoke the principle enunciated in the Hussey case in support of this case.

They also cited the case of *Deseret Salt Company* v. *Tarpey*, 142 U. S., 241. But there the Government of the United States, in the regular manner, had established at least one of the lines of the section in question, so that its grantee could with certainty take possession, and have done so, while in this case the record shows that there was not a Government line established within 28 miles of the land in question, the whole territory within any reasonable distance being entirely unsurveyed. The language of Mr. Justice Field quoted by counsel in the brief before the Circuit Court of Appeals was, in effect, that the reason for the passage of the act requiring the payment of charges and retaining title in the Government was to preserve the Government's control over the granted property, so as to enable it to enforce the survey costs, and merely shows that the Government had preserved such title, and while it did so preserve it the right of possession went with it, and the actual possession as well. And it makes no difference in this case what was the object of the Government in forbidding the

issuance of the legal title, so long as it actually was forbidden.

In the case of *U. S.* v. *Loughrey*, 172 U. S., 206, the title had been granted to the State as trustee for the benefit of a railroad company. The lands had all been surveyed and were capable of identification as soon as the line of permanent location was fixed. In such a case it was entirely proper to hold that the title was in the State as trustee and until it was revoked by proper action in the court for nonfulfillment of the purposes for which the trust was created, the United States could not maintain trespass. But in this case no surveys were made, so there could be no identification; no title was granted to a State in trust for the benefit of the grantee *in præsenti;* and a statute had actually been passed forbidding the issuance of any title papers to the grantee until the costs of survey had been deposited.

We respectfully submit that the three questions asked of this court by the Circuit Court of Appeals should each be answered in the affirmative.

MARSDEN C. BURCH,
Special Assistant to the Attorney-General.

HENRY M. HOYT,
Solicitor-General.

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